IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1497

STATE OF ARKANSAS ..... *Petitioner*

vs.

LONNIE JAMES SANDERS ..... *Respondent*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF FOR PETITIONER

BILL CLINTON
Attorney General
State of Arkansas
JOSEPH H. PURVIS
Deputy Attorney General
JUSTICE BUILDING
LITTLE ROCK, ARKANSAS 72201
AND
JOHN WESLEY HALL, JR.
Deputy Prosecuting Attorney
304 PULASKI COUNTY COURTHOUSE
P. O. BOX 1979
LITTLE ROCK, ARKANSAS 72203
Attorneys for Petitioner

Req. No. 78-5268 50 Copies

Index

CITATIONS

CASES: Page

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1497

STATE OF ARKANSAS ..... *Petitioner*

vs.

LONNIE JAMES SANDERS ..... *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR PETITIONER

I. OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at 262 Ark. 595, 559 S.W. 2d 704 (1977) and is attached in the Appendix.

II. JURISDICTION

The opinion of the Arkansas Supreme Court was filed December 19, 1977. Petitioner's petition for rehearing was denied by that court and the judgment was entered on January 23, 1978. This Petition for a Writ of Certiorari was filed within ninety days of that date. Jurisdiction of this court is invoked under 28 U.S.C. § 1257 (3).

III. QUESTION PRESENTED

Whether a warrantless search of both an automobile trunk and an immediately warrantless search of an unlocked suitcase found therein where the search of both is based on probable cause and exigent circumstances is reasonable and lawful under the Fourth Amendment to the Constitution of the United States.

IV. CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

V. STATEMENT OF THE CASE

On Friday, April 23, 1976, Officer David Isom of the Little Rock Police Department Narcotics Squad, acting upon information provided by a confidential informant (T. 25-29), went to the Little Rock Municipal Airport to set up surveillance for the respondent, Lonnie James Sanders. (T. 25, 72) According to the informant, respondent was scheduled to arrive that afternoon in Little Rock on an American Airlines flight from Dallas, Texas at 4:35 p.m.. with a green suitcase carrying marijuana. (T. 31) The informant told Isom that respondent had sent an empty green suitcase to Dallas for the purpose of transporting marijuana back to Little Rock. (T. 31) Accompanied by two other plainclothes officers, Isom observed Sanders get off the 4:35 p.m. Dallas flight and proceed to the baggage claim area of the terminal where Sanders met David Rambo. (T. 26, 74) From a distance, the officers observed respondent wait at the baggage area and pick up a green suitcase. He handed it to Rambo, and he walked to the nearby cab stand and got in a taxicab. (T. 26, 74) Rambo remained in the baggage area for a few moments until the surrounding crowd dispersed, and then he got in the taxicab with respondent. (T. 27, 76, 86) Rambo placed the green suitcase in the trunk of the taxicab (T. 93) and the cab left the airport.

Officer Isom and one of the others followed the taxicab as it proceeded down East Roosevelt Road, a major arterial in Little Rock. (T. 27, 76) The officers had requested assistance from a marked police unit over their radio. The other police car stopped respondent's taxicab on East Roosevelt several blocks from the airport. (T. 47, 76) The cab driver was asked out of the cab and to open his trunk, and he did. Respondent and Rambo were taken out of the cab by the police and placed against the side of the vehicle. (T. 48) They were not placed under arrest at that point. (T. 48) In the trunk the officers found the green suitcase, and, without seeking anyone's consent, they opened it. (T. 35) It was unlocked. (T. 35) In the suitcase they found what they suspected was (T. 43), and later proved to be, 9.3 pounds of marijuana. (T. 147) Respondent Sanders and Rambo were arrested and transported to the police department. (T. 43) The cab driver was released.

On October 14, 1976, Sanders was charged by felony information with possession of marijuana with intent to deliver in violation of Ark. Stat. Ann. § 82-2617 (Repl. 1976), the Uniform

Controlled Substances Act. Sanders' motion to suppress the evidence found in the suitcase was denied after a hearing held January 31, 1977. (T. 7) Sanders was tried by a jury and found guilty on February 3, 1977 and sentenced to ten years in the state penitentiary and fined $15,000. (T. 8, 9)

On appeal to the Arkansas Supreme Court, the conviction was reversed because the search was held unreasonable under the Fourth Amendment to the United States Constitution.[1] *Sanders* v. *State*, 262 Ark. 595, 559 S.W. 2d 704 (1977), Appendix A.

The court first held there was probable cause for the police to believe there was a controlled substance in the green suitcase when it was seized and searched under the Fourth Amendment. The confidential informant gave detailed information about the respondent's arrival at the Little Rock Airport on April 23, 1976 (and the police corroborated all the details from the informant by personal observation at the airport).

The court next held the search was not justified under the automobile exception because the police took possession of the suitcase even though the cab was on the street.

> "[T]here is nothing in this set of circumstances that would lend credence to an assertion of impracticality in obtaining a search warrant, or support the State's contention that 'mobility of the object to be serrched (the green suitcase)' justified a warrantless search. See: • • • *Coolidge* v. *New Hampshire* [403 U.S. 443]." *Id.*, at 600, 559 S.W. 2d at 706.

[1]The decision was based solely on the Fourth Amendment to the United States Constitution. There were no state grounds involved. *Sanders* v. *State*, 262 Ark. 595, 599, 559 S.W. 2d 704, 706 (1977).

The court added that there was a substantially greater expectation of privacy in a suitcase than an automobile under the Fourth Amendment, and the suitcase was sufficiently out of reach not to be within the search incident to an arrest doctrine. *Ibid.*

The court finally stated that once the police had the suitcase in their control, there was no longer any danger of loss or destruction of evidence, and a warrant should have been obtained.

> "The initial seizure of appellant's suitcase, the validity of which appellant does not contest, was sufficient to guard against any risk that evidence might be lost. With the suitcase safely immobilized it was unreasonable to undertake the additional and greater intrusion of a serrch without a warrant." *Id.*, at 601, 559 S.W. 2d at 707.

The court was apparently holding that on seizure of the suitcase by the police on the street, exigent circumstances ceased to exist even if there were exigent circumstances for seizure of the vehicle. (Compare *id.*, at 599, 559 S.W. 2d at 706.) Therefore, a warrant was required under the Fourth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

A.

The Arkansas Supreme Court erred in holding that the warrantless search of the green suitcase was unreasonable. The court ignored the facts, petitioner's argument and Constitutional precepts, as well as common logic in its efforts to

fit the facts of this case within the ambit of *United States* v. *Chadwick*, 433 U.S. 1 (1977). The court concluded that the officers had probable cause to believe that the taxi and the suitcase within contained contraband and that the officers were justified in stopping the taxi on the busy street during Friday rush hour traffic. They erroneously concluded, however, that there were no exigent circumstances to justify a warrantless search. Further, in its determined effort to stretch *Chadwick* to fit this case, the court misconstrued, added to and ever created argument and fact in order to make the language of *Chadwick* fit the facts here. In short, the opinion is irrational in light of the facts and incorrectly applies *Chadwick*.

B.

The search here was clearly reasonable as being made under the automobile exception to the warrant requirement of the Fourth Amendment. This Court has created what has come to be called the "automobile exception", which deems reasonable warrantless searches of cars when there is probable cause to believe that they contain contraband and exigent circumstances surrounding the mobility of the automobile precludes or makes impractical the obtaining of a search warrant. The facts of this case bring it squarely within the ambit of the automobile exception. Here, the officers had probable cause to believe that the respondent's green suitcase contained contraband and was located in the trunk of the taxicab; that the taxi was carrying the respondent, the suitcase and an accomplice who had not been known to the officers until just moments before, away from the airport during Friday afternoon rush hour traffic. These factors clearly made the brief street-side stop and search of the taxi and the discovery of the contraband in the suitcase reasonable pursuant to the automobile exception.

C.

The Arkansas Supreme Court based its decision upon *United States* v. *Chadwick, supra*. *Chadwick* did not deal with an automobile exception case, but rather with a rejection of an attempt to create a new exception to the warrant requirement of the Fourth Amendment for personalty in the possession of an arrestee. This attempted exception would have allowed the warrantless search of personalty due to its mobility and would have amounted to an extension of the rationale of the automobile exception beyond automobiles. The *Chadwick* decision did not vitiate reasonable searches made pursuant to the automobile exception, nor did it restrict the limits of a legitimate automobile exception search. To extend the holding of *Chadwick* to so do would be error and that is precisely what the Arkansas Supreme Court did.

ARGUMENT

A.

THE ARKANSAS SUPREME COURT ERRED IN HOLDING THE WARRANTLESS SEARCH OF THE RESPONDENT'S GREEN SUITCASE TO BE UNREASONABLE.

The Arkansas Supreme Court erred in holding that the search of the respondent's green suitcase was unreasonable. In making its ruling, the Arkansas Supreme Court noted the exception to the warrant clause of the Fourth Amendment upholding warrantless searches as reasonable where there is probable cause coupled with exigent circumstances. The court examined the facts of the case and held that, while the officers did have probable cause to believe that respondent's green suitcase contained contraband, the search was nevertheless invalid under the rule of *United States* v. *Chadwick*, 433 U.S. 1 (1977), in that there were no exigent circumstances. *Sanders* v. *State of Arkansas*, 262 Ark. 595, 559 S.W. 2d 704, 706 (1977). The petitioner agrees with the Arkansas court's finding of probable cause, but disagrees with its overbroad application of *Chadwick* so as to negate a finding of exigent circumstances.

In the case at hand, the Arkansas court had no problem in finding probable cause for the police to believe that Sanders's green suitcase contained marijuana. The informant, whose reliable information in the past had led to three previous convictions of Sanders for narcotics violations, contacted the police on Friday, April 23, 1976, and gave most detailed information about Sanders's expected arrival at the Little Rock Airport on that same day. (T. 25-31, 72)

The informant had stated that the respondent would be arriving in Little Rock on the 4:35 p.m. American Airlines flight from Dallas at Gate 1 and would have a green suitcase full of marijuana. (T. 25-31) This information was corroborated by the officers' personal observation of the respondent at the airport and probable cause culminated with respondent's picking up of his green suitcase at the baggage claim area, giving it to his confederate, Rambo, and their departure in a taxi.

The Arkansas court implicitly held that the officers did have probable cause, and that exigent circumstances were present such as to make reasonable the seizure of the taxi, the search of the cab for the suitcase, and the seizure of suitcase. The court held, however, that pursuant to *United States* v. *Chadwick*, *supra*, the exigent circumstances which would have made reasonable a warrantless search of the unlocked suitcase were totally dissipated when the officers gained control of the luggage on the street. *Sanders* v. *State of Arkansas*, *supra*, 559 S.W. 2d at 706; Petition for cert. at 5(a).

Chadwick dealt with the warrantless seizure of a 200 pound double-locked footlocker by federal agents as it was being placed into the open trunk of a parked car whose engine was not running. 433 U.S. at 4. The defendants were arrested and they and the trunk were taken to the federal building where the footlocker remained under the exclusive control of the federal agents. An hour and a half after the arrest and seizure, the agents conducted a warrantless search of the footlocker in the federal building. *Id.*

The government in *Chadwick* put forth three theories in attempting to justify the search. The first, which it raised only at the district court level, was that the search was reasonable

pursuant to the automobile exception to the warrant requirement. The district court rejected this argument based upon the facts surrounding the seizure, noting that the connection between the auto and the footlocker was "merely coincidental." 433 U.S. at 5.

The other two theories which the government employed were that the search was incident to a valid arrest and that because of the inherent mobility of the footlocker, the search was justified. As to the former, the Court held that warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest if the search is remote in time or place from the arrest or no exigency exists. Going further, the Court noted that .

> "once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is *no longer an incident of arrest.*" 433 U.S. at 15 (emphasis supplied).

In the "mobility of luggage" argument, the government sought to break new ground by creating a new exception to the Fourth Amendment closely analogous to the automobile exception. 433 U.S. at 11, 12. After discussing the automobile exception and its rationale as well as giving a discussion of the role of the luggage, the Court rejected creation of the government's luggage mobility exception based on the facts of the case:

> "Once the federal agents had seized it [the footlocker] at the railroad station and had safely taansferred it to the

> Boston Federal Building under their exclusive control, there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained." 433 U.S. at 13.

Thus, the Court refused to adopt a "mobility exception" to the Warrant Clause of the Fourth Amendment where the 200 pound double-locked footlocker not only had been seized but also had been in the exclusive custody of the agents at the federal building for an hour and a half prior to its warrantless search.

Given the facts and holding of *Chadwick*, the Arkansas Supreme Court erroneously applied *Chadwick* to the search of the respondent's green suitcase in deeming that search unreasonable. Petitioner's sole contention before the Arkansas Supreme Court was that the search of the suitcase was a reasonable one under the automobile exception to the warrant requirement pursuant to *Carooll* v. *United States*, 267 U.S. 132 (1925); and *Chambers* v. *Maroney*, 399 U.S. 42 (1970). The reasons for such will be fully set forth in Part B of this argument.

Given this fact, the Arkansas Supreme Court dismissed petitioner's argument in a misdirected attempt to bring the case within the ambit of *Chadwick*. In so doing, the Arkansas court erroneously employed the language and rationale of *Chadwick*, used to refute an attempted extension of search incident to a lawful arrest doctrine and the creation of a "mobility doctrine," to totally dissipate the real exigent circumstances of a reasonable search under the "automobile exception". In this regard, it must be noted initially that a search incident to arrest and an automobile exception search are as different as night and day. So, too, are the exigencies which legitimize the

searches under each doctrine. The exigency behind a search incident to an arrest is primarily for the protection of the arresting officer. It is reasonable for him, in making his arrest, to protect himself by searching the person arrested for weapons which the the arrestee might use to resist or escape. *Pennsylvania* v. *Mimms*, 434 U.S. 1;6 (1977). The "search incident" doctrine also allows the officer to search the immediate area into which an arrestee might reach to grab a weapon or destructable evidence. See *Chimel* v. *California*, 395 U.S. 752, 763 (1969).

The exigencies which make a search reasonable pursuant to the automobile exception to the warrant requirement, on the other hand, are quite different indeed. This doctrine is premised upon the realization that contraband goods are often concealed and transported in automobiles or other vehicles and that the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforseeable and that the opportunity to search is fleeting since a car is readily movable. *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974); *Chambers* v. *Maroney*, *supra*, 399 U.S. at 50-51.

Thus, as apples and oranges are both fruit but totally different, so the only common touchstone of the search incident doctrine and the automobile exception to the Warrant requirement is the preservation of evidence sometimes found in a search at the time of an arrest. Apart from that, they are different doctrines with different factors and criteria for the employment and rejection of each.

With this in mind, it can readily be seen how the Arkansas Supreme Court, in its over-eager erroneous attempt to bring the case within *Chadwick*, misconstrued the facts and misquoted

petitioner's argument, and misapplied this Court's ruling in *Chadwick*.

Here, the Arkansas Court erroneously disposed of the automobile exception which was petitioner's sole justification for the search. The court held that, even though respondent and the suitcase had left the airport traveling in a taxi, the relationship between the suitcase and the taxi was "coincidental." (Compare, 559 S.W. 2d at 706, fn. 2, *with* 433 U.S. at 5.) Petitioner submits that the relationship here is substantial and is a far cry from the "coincidental" relationship of the footlocker and the car found in *Chadwick*, 433 U.S. at 4, 5, where the footlocker had just been placed into the open trunk of the parked car whose engine was not running.

The Arkansas court went on to find, implicitly if not explicitly, that, while there was probable cause to stop the taxi and exigent circumstances to justify a warrantless search and seizure of the taxi, there were no exigent circumstances present to justify the warrantless search of the suitcase found in the taxi, based upon *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Petitioner notes that *Coolidge* refused to find exigent circumstances present to justify a warrantless automobile search, based upon some eight factors, one of which was that the car in question was parked in the driveway of the home, that it was immovable, and that the search took place well after probable cause was found. 403 U.S. at 460-464. Petitioner also notes that in stressing the necessity of exigent circumstances, the Court in *Coolidge* distinguished between the car there and those in *Carroll* v. *United States*, *supra*, and *Chambers* v. *Maroney*, *supra*, which had been stopped on a highway. 403 U.S. at 459-460. It seems clear that the Arkansas court's reliance upon *Coolidge* is ill-founded.

Apparently, the Arkansas court felt that, having made a valid seizure of the taxi, having conducted a valid search of the cab, and having made a valid seizure of the suitcase, the officers should have then taken the respondent, his confederate, the suitcase and maybe the cab driver to the police station and obtained a warrant. While petitioner will deal with this point more fully in Part B, suffice it to say that this is exactly the circumstance discussed by the Court in *Chambers* v. *Maroney, supra,* 399 U.S. at 51-52.

Petitioner takes particular umbrage at the Arkansas court's erroneous statement that petitioner contended that "the mobility of the object to be searched (the green suitcase) justified a warrantless search." *Sanders* v. *State of Arkansas, supra,* 559 S.W. 2d at 706. This was never argued in the Arkansas court. (See petitioner's brief in Appendix) The court then used this alleged contention to springboard into a mirror of the *Chadwick* rejection of the "mobility doctrine," 433 U.S. at 13. Petitioner's sole contention on this point has always been that the search was reasonable pursuant to the automobile exception, and it did not allege or even allude to that which the court quoted.

While the petitioner will discuss this area more fully in Part B, it cannot help but note that the doctrine and phraseology employed here by the Arkansas court is questionable. It was utilized by this Court, in *Chadwick,* to note that once the double-locked, 200 pound footlocker had been seized and transferred to the federal building, a warrant could then have been obtained. The validity of this rationale certainly cannot be denied when applied to the facts in *Chadwick,* where the automobile exception was not asserted by the government. It is highly questionable whether it is equally applicable to the facts in *Sanders* where: (1) the automobile exception, rather than the mobility doctrine, is

the *only* ground asserted by petitioner to justify the search; (2) the search had been contemporaneous to the seizure, rather than an hour and a half subsequent by petitioner to justify the search; (3) we are confronted with a suitcase which was unlocked, rather than a 200 pound, double locked footlocker; (4) the suitcase had not been removed from the situs of the seizure; (5) it is questionable whether the officers had the suitcase under their exclusive control prior to the search; and (6) contrary to the court's assertion, the respondent did contest the validity of the initial seizure of his suitcase. (See respondent's argument of this point in his appellate brief in the Appendix) *Also see Chambers* v. *Maroney, Id.*

Here, the Arkansas Supreme Court erroneously deemed the city street search of the green suitcase unreasonable in light of *Chadwick*. *Chadwick* did not involve the automobile exception and there is nothing within *Chadwick* that indicates that it limits the scope of a valid automobile exception search. 433 U.S. at 11, 12, 13; *also see, United States* v. *Finnegan,* 568 F. 2d 637, 640-642 (9th Cir. 1977); *United States* v. *Gaultney,* 581 F. 2d 1137, 1144-1145 (5th Cir. 1978); *United States* v. *McGrath,* 448 F. Supp. 1338, 1341-1342 (S.D. N.Y. 1978). Petitioner submits that *Chadwick* stands for the principle that where the warrantless search of luggage cannot be justified under either the automobile exception or as a search incident to an arrest, the court will not allow the search based upon "mobility of luggage."

Here, the Arkansas Supreme Court invalidated a reasonable search under the automobile exception to the warrant requirement of the Fourth Amendment by erroneously stretching the holding of *Chadwick* and the facts of *Sanders,* and by twisting and even creating petitioner's argument on appeal.

While there is an indication that the Arkansas Supreme Court implicitly recognized the error it made below in this case through its strange *"inter-state* vs. *intra-state* state journey distinction" in *Berry* v. *State of Arkansas*, 263 Ark. 446, 565 S.W. 2d 418 (1978), the result of the case here is an incorrect decision which, if allowed to stand, emasculates the automobile exception in Arkansas.

B.

THE WARRANTLESS SEARCH OF RESPONDENT'S GREEN SUITCASE WAS REASONABLE AS MADE PURSUANT TO THE "AUTOMOBILE EXCEPTION."

The Fourth Amendment to the United States Constitution states:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In applying this Amendment, this Court has held that the fundamental inquiry has been whether a search or seizure is reasonable under all of the circumstances. *United States* v. *Chadwick*, *supra*, 433 U.S. at 9; *Cooper* v. *California*, 386 U.S. 58, 59, 61 (1967). In making such a determination this Court has recognized that there are significant differences between automobiles and stationary property which permit the warrantless seizure and search of automobiles in circumstances

in which warrantless searches would not be reasonable in other contexts.

The "automobile exception" was first recognized in *Carroll* v. *United States*, 267 U.S. 132 (1925), wherein this Court deemed reasonable the warrantless search and seizure where there was: (1) probable cause for believing that the car was carrying contraband, and (2) exigent circumstances precluded the search and seizure, unless done without a warrant. *Id.*, 267 U.S. at 154, 156.

In *Chambers* v. *Maroney*, *supra*, the petitioner contended that the warrantless search and seizure were unconstitutional since (a) the officers did not have probable cause to arrest him, and (b) the fact that the search took place after the car and its occupants were in police custody and hence, had ample opportunity to procure a search warrant. See petitioner's brief, 26 L. Ed. 2d at 891.

After determining that probable cause had existed to seize the car and its occupants, 399 U.S. at 47-49, the Court turned its attention to the second prong of *Carroll*, probable cause, and rejected petitioner's second contention holding:

> "Neither *Carroll*, *supra*, nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords. But the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforseeable; moreover, the opportunity to search is fleeting since a car is readily movable. Where this is true, as in *Carroll* and the case before us now, if an effective

search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search. In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable-cause issue and the issuance of a warrant before a search is made. Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. *Carroll, supra*, holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible."

"Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater.' But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to

search, either course is reasonable under the Fourth Amendment." 399 U.S. at 50-52.

Thus, *Chambers* made it clear that, given the two prongs of the "automobile exception", there is no constitutional qualitative difference between a search and a seizure; that is, given a valid seizure pursuant to the "automobile exception", a valid search is permissible also. See Moylan, *"The Automobile Exception: What It Is and What It Is Not — A Rationale In Search of a Clearer Label."*, 27 Mercer L. Rev. 987, 1002-1003 (1976).

Turning back to the facts of *Sanders*, it is obvious that the officers had probable cause, having received information that Sanders would be arriving at 4:35 p.m. that day on the Friday afternoon American Airlines flight from Dallas, that he would be de-planing at Gate 1 and that he would be bringing a green suitcase filled with marijuana. (T. 25-31) The fact that the informant had previously supplied information which had led to Sanders being convicted of three narcotics violations increased the credibility of the information, leading the three officers to set up surveillance at the airport.

Lest the contention be raised that the officers could have obtained a search warrant prior to their surveillance, it should be noted that, at that point, there was no corroboration of the informant, and there would have still been problems particularly describing the place to be searched. Further, there is nothing in the record to indicate the underlying circumstances from which the informant concluded that the respondent was transporting marijuana. Therefore, the affidavit upon which an applicant would have suought to obtain the search warrant would have been constitutionally defective. *Aguilar* v. *Texas*, 378 U.S. 108, 114 (1964).

Therefore, it was not until they observed respondent pick up his green suitcase at the baggage area that information received from the informant was corroborated, ripening into probable cause to believe that Sanders's suitcase contained marijuana.

At that point, however, the respondent had been joined by a confederate, and when both of them got into the taxi, placing the suitcase in the trunk, and began to drive away, exigent circumstances certainly existed. (T. 26-28, 32-34, 44, 46, 52, 53, 86, 93) At that point the officers ran for their car to follow the taxi and were moving so quickly that Officer Mize was left behind in the airport. (T. 27, 44, 53) The two officers followed respondent's taxi down one of the busiest streets in Little Rock during 5 o'clock traffic on a Friday afternoon and called for the assistance of a marked patrol car. (T. 47, 76) In light of the fact that the respondent was in the company of an accomplice and the officers knew not the respondent's destination, they were clearly within the ambit of *Chambers* and *Carroll* in stopping the cab and conducting a warrantless search. *Chambers* v. *Maroney*, *supra*, 399 U.S. at 50-51, also see, fn. 9 at 51; *Cooper* v. *California*, *supra*, 386 U.S. at 59; *South Dakota* v. *Opperman*, 428 U.S. 364, 367 (1976).

The taxi was stopped on the busy street during rush hour and the driver was asked to open the trunk. (T. 47, 48) In the trunk the officers saw the green suitcase. It was not locked and they quickly opened it, finding over 9 pounds of marijuana. (T. 27, 35, 147) The respondent and his accomplice were then placed under arrest. (T. 34) The detention on the street was direct and brief but adequate to determine that the respondent and his accomplice should be arrested. Clearly, the search was a reasonable one pursuant to the "automobile exception" as delineated by *Chambers* and *Carroll*.

The Arkansas Supreme Court held, however, that the exigent circumstances which were present allowing the stop of the taxi became non-existent once the cab stopped. Such reasoning defies both common sense and the rule of the "automobile exception" and denotes some constitutional confusion on the court's part. The court's apparent logic was that once the officers stop or seize a vehicle, their mere presence terminates all exigencies. Were this logic valid, there would be no such thing as an "automobile exception," save when some daring officer leaps from his moving vehicle into that of the suspect's. As this Court noted in *Carroll*, a form of the "automobile exception" has been around in this country since at least 1789. 267 U.S. at 150-151. Contrary to the court's tilted logic, exigent circumstances justifying the seizure do not immediately evaporate upon the presence of law officers at the scene of the seizure. *Carroll* v. *United States*, *supra*; *Chambers* v. *Maroney*, *supra*; *Cady* v. *Dombrowski*, 413 U.S. 433, 441-442 (1973); *Cardwell* v. *Lewis*, 417 U.S. 583, 595-596 (1974); *Texas* v. *White*, 423 U.S. 67 (1975).

Perhaps the logic of the court is that, given the valid stop or seizure of the taxi, the exigent circumstances are not existent because, since the car is a taxi rather than respondent's own vehicle, there is no danger that it would be moved out of the locality while the officers left the scene at 5 o'clock on a Friday afternoon in order to obtain a warrant. Such chauvanistic thinking would not take into account the facts that it is the suspect who was headed *somewhere* in the cab and that it is he who is paying the fare and is then alerted. Given this, the departure of the police to obtain a warrant leads to the very real possibility that the contents may never be found again. It is precisely this situation to which this Court addressed itself in *Chambers* v. *Maroney*, *supra*, 399 U.S. at 51; and noted in *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 459-460.

Perhaps the logic of the court is that, having the situation apparently under control, the police should then escort everyone to the police station while they obtain a warrant. It being around 5:00 p.m. on a Friday afternoon, this would involve a minimal delay of some two hours while the parties are transported to the police station for booking and fingerprinting and the police try and locate a judge to issue the search warrant. It is precisely this situation *Chambers* addressed when it was said:

> "Carroll, supra, holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible.
>
> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." 399 U.S. at 51-52; *Cardwell* v. *Lewis, supra*, at 594.

THIS logic of the Court would also conflict with *Cardwell's* language stating:

> "Assuming that probable cause previously existed we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is inforeseeable and arises only at the time of the arrest. cf. *Chambers, id.*, at 50-51. The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action." 417 U.S. at 494-596.

Finally, given the fact that the court erroneously stated that the petitioner contended that "mobility of the object to be searched (the green suitcase) justified a warrantless search," it is possible that the court applied "search incident to arrest" doctrine to determine that there were no exigent circumstances.

Whatever the rationale for the court's decision, it is clear that the facts of this case show the search to have been reasonable under the "automobile exception." At the moment of corroboration of the informant at the airport, the officers had probable cause to believe that the suitcase contained contraband; hence, they had probable cause to search the suitcase. When the respondent and his accomplice drove away with the suitcase in the taxi, they then certainly had probable cause to believe that the taxi contained the contraband and likewise had probable cause to search it.

There is likewise no doubt as to the existence of exigent circumstances when the officers watched respondent and the accomplice place the suitcase in the trunk of the cab and drive away onto one of the busiest streets in the city in the Friday afternoon rush hour traffic to an unknown destination. The exigent circumstances made it impractical to seek a warrant. Obviously, then, the officers were justified in seizing the taxi on the street pursuant to the "automobile exception" of *Chambers* and *Maroney, supra;* and *Carroll* v. *United States, supra*. Therefore, there being no constitutional qualitative difference under the "automobile exception" between a search and seizure, *Chambers*, 399 U.S. at 51-52, the warrantless search of the vehicle was reasonable.

The question then becomes whether the search of the green suitcase found in the trunk was reasonable and the answer must be in the affirmative, because it was the fruit of the reasonable "automobile exception" search.

In *Carroll,* this Court held that the intrusion, the search and seizure of the car, was reasonable pursuant to what is now known as the "automobile exception." The Court held that the officers, armed with probable cause to believe that contraband was situated *somewhere* within the car and faced with the exigencies in complying with the Warrant requirement which were inherent in a moving vehicle, search of the car for that contraband was reasonable. Hence, given the reasonableness of the search and seizure pursuant to the "automobile exception," the fruits of that search, which were found behind the upholstery of the seats, clearly would have been admissible.

In *Chambers,* the officers had probable cause to believe that the car contained contraband and the fruit of the crime,

although they did not know *where* in the car it was located. In view of the probable cause to search, coupled with the exigent circumstances, the Court held that the search of the car and the seizure of the gun and fruit of the crime found in the compartment under the dash were reasonable pursuant to the "automobile exception;" hence, the fruit of the reasonable search was admissible.

The point of this is that in neither *Carroll* or *Chambers* did the officers know where in the automobile the objects of their searches were. Under the "automobile exception" they were allowed free rein to search the entire vehicles to find those objects, the exact substance of which they knew not prior to the search. Further, it was the existence of the exigencies inherent in moving autos, coupled with the officers' probable cause to believe that the contraband or fruit of the crime was located in the car, that made reasonable the warrantless search and admissible the fruit of the search.

Here, the officers had probable cause to believe that the green suitcase contained contraband. They also knew that the suitcase was in the trunk of the taxi as it drove away from the airport. Like *Carroll* and *Chambers,* the officers had probable cause to believe that the car contained contraband. Further, since they had seen the suitcase being placed in the trunk and therefore knew the exact location of the contraband within the vehicle it could be said that even greater probable cause existed in the instant case than in *Carroll* and *Chambers*. Thus, this probable cause coupled with the exigencies here (the moving auto; the 5:00 p.m. Friday rush hour traffic on one of the busiest streets in the city; the fact that it was highly probable that it would take longer than normal to have a search warrant issued since the courts had all closed for the weekend; the fact that the

respondent had been joined by a confederate), combined to justify the seizure of the taxi and the searching of it pursuant to the automobile exception to the Fourth Amendment.

Given the reasonableness of a warrantless search pursuant to the automobile exception, we know of no case which limits extent of the area of the vehicle or the fruit of that search. Indeed, the warrantless search of trunks or luggage found within the trunk of a car during a search pursuant to the automobile exception to the Fourth Amendment has long been deemed a reasonable one. *United States* v. *Finnegan, supra,* 568 F. 2d at 640-641; *United States* v. *Gaultney, supra,* 581 F. 2d at 1144-1145; *United States* v. *Ficklin and Seefeldt,* unreported below, Nos. 77-2923 and 77-3220, (9th Cir., filed February 10, 1978), cert. denied, 47 U.S.L.W. 3222 (No. 77-1635; October 2, 1978); *Swonger* v. *United States,* unreported below, No. 76-2555 (6th Cir. 1977), summary at 46 U.S.L.W. 3225, cert. denied, 46 U.S.L.W. 3470 (No. 77-314; January 24, 1978); *United States* v. *Soriano,* 497 F. 2d 147 (5th Cir. 1974) (en banc), reaffirmed without opinion sub nom.; *United States* v. *Aviles,* 535 F. 2d 658 (5th Cir. 1976), cert. denied, 433 U.S. 911, 53 L. Ed. 2d 1095; *United States* v. *Tramunti,* 513 F. 2d 1087 (2d Cir. 1975), cert. denied, 423 U.S. 832; *United States* v. *Canada,* 527 F. 2d 1374 (9th Cir. 1975), cert. denied, 429 U.S. 867; *United States* v. *Issod,* 508 F. 2d 990 (7th Cir. 1974), cert. denied, 421 U.S. 916; *United States* v. *McGarrity,* 559 F. 2d 1386, 1387-1388 (5th Cir. 1977); *United States* v. *Giles,* 536 F. 2d 136, 140 (6th Cir. 1976); *People* v. *Kreichman,* 37 N.Y. 2d 693, 376 N.Y.S. 2d 497, 339 N.E. 2d 182 (1975); *People* v. *Lemmons,* 40 N.Y. 2d 505, 387 N.Y.S. 2d 97, 354 N.E. 2d 836 (1976); *Wimberly* v. *Superior Court,* 45 Cal. App. 2d 486, 119 Cal. Rptr. 514, 519-521 (1975), *vacated on other grounds,* 128 Cal. Rptr. 641, 547 p. 2d 417 (1976).

In sum, the search here was clearly reasonable as having been made pursuant to the automobile exception to the Warrant Clause of the Fourth Amendment.

C.

UNITED STATES V. *CHADWICK*, 433 U.S. 1 (1977), IS INAPPLICABLE TO THIS CASE AND DOES NOT RESTRICT A REASONABLE WARRANTLESS SEARCH MADE PURSUANT TO THE AUTOMOBILE EXCEPTION TO THE WARRANT CLAUSE OF THE FOURTH AMENDMENT.

United States v. *Chadwick, supra,* is inapplicable to this case. The issue before the Court in *Chadwick* was "whether a search warrant is required before federal agents may open a locked footlocker which they have lawfully seized at the time of the arrest of its owners, when there is probable cause to believe the footlocker contains contraband." 433 U.S. at 3.

As is obvious from the issue presented, *Chadwick* does not deal with a reasonable search made pursuant to the automobile exception of the Warrant Clause of the Fourth Amendment. The only involvement that *Chadwick* had with an automobile was the fact that the footlocker was seized as it was placed into the open trunk of a parked car before its engine had been started. 433 U.S. at 4.

This being the factual connection of the footlocker's momentary contact with the automobile and noting the status of the car at the time of seizure, it is patent that the second prong of the automobile exception, exigent circumstances

prohibiting the obtaining of a warrant, could not have been satisfied. *Coolidge* v. *New Hampshire, supra,* 403 U.S. at 459-462. Apparently the government realized that the facts here w uld not place the case at all within the automobile exception, and after the district court dismissed this contention by noting the mere coincidental relationship between the car and footlocker, the government never raised the contention again. 433 U.S. at 5, 11, 12.

Upon seizing the 200 pound, double-locked footlocker and arresting the petitioners, the government transported the locker and arrestees to the federal building where the locker remained under the exclusive control of the government for an hour and a half. At that point, the agents conducted a warrantless search of the lecker which yielded marijuana. 433 U.S. at 5.

Having quickly abandoned its theory that the search was reasonable under the automobile exception, the government proceeded upon two theories: (1) that the Court should create a new exception to the Warrant requirement of the Fourth Amendment holding that movable personalty lawfully seized in a public place should be subject to a search without warrant if probable cause exists to believe it contains evidence of a crime; (2) that the Constitution permits the warrantless search of any property in the possession of one arrested in public, so long as there is probable cause to believe that the property contains contraband or evidence of crime. 433 U.S. at 14. In proffering its first theory, the government asked the Court to analogize the rationale of automobile searches to permit warrantless searches of luggage. In advancing the second argument, the government contended that the Warrant requirement of the Fourth Amendment protects only interests traditionally identified with the home. *Id.* The Court dismissed this argument, discussing at

some length the history of the Fourth Amendment and the narrow exceptions to the Warrant requirement. 433 U.S. at 6-11.

Turning to the government's two theories, the Court rejected the former on the grounds that there are significant differences between motor vehicles and other property which justify the different treatment, such as a vehicle's inherent mobility making obtaining a warrant impracticable and the diminished expectation of privacy surrounding automobiles. 433 at 12-13. The Court then noted that these special distinctions did not apply to luggage, which was primarily intended as a repository of personal effects. 433 U.S. at 13.

The Court, therefore, refused to create a new exception to the Warrant requirement for mobile personalty or luggage which would have been based on the same rationale as the automobile exception. In refusing to do so, it noted that there were no exigent circumstances present here justifying the warrantless search of the 200 pound, double-locked footlocker at the federal building, one and one-half hours after the agents had reduced it to their exclusive control. 433 U.S. at 13.

The Court rejected the government's second theory, stating that the agent's search here could not be justified as a search incident to the arrest under *Chimel, supra; Terry* v. *Ohio,* 392 U.S. 1 (1968); or *United States* v. *Robinson,* 414 U.S. 281 (1973), because of *Preston* v *United States,* 386 U.S. 364, 367 (1964), and the Court concluded:

> "Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrester might gain

access to the property to seize a weapon or destroy evidence, a search of that property is no longer an *incident of the arrest*. 433 U.S. at 15. (emphasis supplied).

It should be noted that the Court rejected the government's theories attempting to create new classes of exceptions to the Warrant requirement, and it did *not* say that luggage could not be searched without a warrant where the search was reasonable pursuant to a recognized exception to the Warrant requirement. Indeed, this Court recognized that there may be situations in which a warrantless search of luggage is reasonable when exigent circumstances exist. 433 U.S. at 11. One of the two elements of the automobile exception which makes the warrantless search reasonable is the existence of exigent circumstances, which preclude obtaining a warrant. *Carroll* v. *United States*, *supra*, 267 U.S. at 153; *Chambers* v. *Maroney*, *supra*, 399 U.S. at 50-51; *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 459-462.

United States v. *Chadwick*, *supra*, did not involve a fact situation within the ambit of the automobile exception; nor did *Chadwick* proscribe the search of luggage done within the ambit of the automobile exception, which is the situation in the case at hand. In *Chadwick*, the connection between the 200 pound, double-locked footlocker and the car was coincidental. The footlocker had just been placed in the trunk at the moment of apprehension. The trunk was still open, the car was parked and the engine was not running. Here, the unlocked suitcase was in the closed trunk of an automobile, which was moving along a busy city street at rush hour on a Friday afternoon. The relationship here between the taxi and the suitcase could hardly be termed "coincidental".

To extend the language and doctrine of this Court which it employed to dismiss attempts to extend the automobile exception to personalty and to extend the time frame for search incident to arrest, to proscribe a reasonable search conducted pursuant to the automobile exception of the Fourth Amendment is error. As the Ninth Circuit stated in *United States* v. *Finnegan*, *supra*, and noted in *Berry* v. *State of Arkansas*, *supra*, 565 S.W. 2d at 420:

> "Were we to rule that *Chadwick* applies here and renders the search of the suitcase illegal, inconsistent and contradictory results would follow. For instance, a police officer could search and seize a brick of marijuana lying inside the trunk of a car but not a brick of marijuana lying inside a suitcase in the trunk of a car." 468 F. 2d at 641.

Clearly, *Chadwick* has its realm of applicability, but within the realm of a reasonable search pursuant to the automobile exception is not it.

CONCLUSION

The Writ of Certiorari should be granted, and the decision of the Arkansas Supreme Court should be reversed and the verdict of the trial court reinstated.

Respectfully submitted,

BILL CLINTON
Attorney General
State of Arkansas

JOSEPH H. PURVIS
Deputy Attorney General
JUSTICE BUILDING
LITTLE ROCK, ARKANSAS 72201

AND

JOHN WESLEY HALL, JR.
Deputy Prosecuting Attorney
304 PULASKI COUNTY COURTHOUSE
P. O. BOX 1979
LITTLE ROCK, ARKANSAS 72203
Attorneys for Petitioner